उच्च न्यायालय, छत्तीसगढ़, बिलासपुर

(26)

मामला क्रमांक ..... **सन् 200**

आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

CRIMINAL APPEAL NO.550/2004

APPELLANT (In Jail) — Motilal Gada, aged about 28 years, S/o Maganlal Gada, R/o Village Katangpali, Police Station Saraipali, District Mahasamund, Chhattisgarh.

Vs

RESPONDENT — State of Chhattisgarh, Through: State House Officer, Police Station Saraipali, District Mahasamund, Chhattisgarh

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Present:-
Mr. Ranbir Singh Marhas, Advocate for the appellant.
Mr. Neeraj K.Mehta, Panel Lawyer for the respondent-State.

ORAL JUDGMENT
(22nd November, 2007)

Per Dhirendra Mishra, J:

This criminal appeal is directed against the judgment of conviction and order of sentence dated 28.4.2004 passed in S.T. No.365/03 whereby learned 2nd Additional Sessions Judge, Mahasamund has convicted the appellant under Sections 363, 366 & 376 of the Indian Penal Code (for short 'IPC') and sentenced him to undergo R.I. for 7 years and to pay a fine of Rs.500/- on each count with usual default clauses. All the sentences have been directed to run concurrently.

Case of the prosecution, in brief, is that Nandlal (PW-3), father of prosecutrix, lodged a missing report of Ex.P-18 on 9.6.2003 that his daughter has gone away without informing. During investigation of missing report, the prosecutrix was recovered from Village Paterapali, (Patnagarh) Orissa from the accused and thereafter report of Ex.P-13 was lodged in

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —25—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

the Police Station Saraipali by Nandlal (PW-3) with the allegations that the appellant eloped with the minor prosecutrix on the promise of marriage and thereafter committed rape with her at various places.

During investigation, the prosecutrix was sent for medical examination to Community Health Centre, Saraipali where Dr. (Smt.) Kiran (PW-7) examined her and gave her medico-legal report of Ex.P-8. Dr. (Smt.) Alka Pardal (PW-2) conducted ossification test of the prosecutrix, and gave her report of Ex.P-3 in which she opined that the age of prosecutrix to 14 years. Her school mark sheet (Ex.P-6) was also seized during investigation in which her date of birth is mentioned as 2.4.1988.

After completing investigation, the charge sheet was filed. During investigation, the prosecution examined 9 witnesses in all and thereafter statement of the accused was recorded under Section 313 of the Cr.P.C. in which he denied the evidence available against him in the prosecution case and pleaded innocence & false implication. However, learned Additional Sessions Judge after hearing learned counsel for the respective parties, convicted and sentenced the appellant as mentioned in Para-1 of this judgment.

Learned counsel for the appellant argued that the trial court has assessed the age of the prosecutrix below 18 years on the basis of ossification test as also on the basis of mark sheet of Ex.P-6 according to which her date of birth is 2.4.1988. It was argued that the prosecution

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has not been able to establish that as on what basis the date in the mark sheet has been entered. Even the admission register has not been produced and even the person, who has prepared the mark sheet, has not been examined and that document has been proved by the father of the prosecutrix, who has admitted in his deposition that he is not aware of the date of birth of the prosecutrix and even he has not deposed the year in which the prosecutrix was born. Referring to the statement of Nandlal (PW-3) it was argued that he has categorically stated that her daughter was born in the month of Kartik, whereas, mark sheet shows that the prosecutrix was born in the month of April, which falls in the month of Chait & Baisakh. Dr. Alka Pardal (PW-2) has admitted in her examination that opinion regarding the age based on ossification test is approximate and there is possibility of variation of 2-3 years on either side. Thus, the prosecution has not been able to establish the age of the prosecutrix that she was below 16 years at the time of incident. He further argued that from perusal of the statement of the prosecutrix (PW-1) it would be evident that she accompanied the appellant of her own free will, she came out of her house alone and she accompanied the appellant from the way. She traveled various places with the appellant and even in the panchayat convened in Village Dhuchapal, the prosecutrix and the appellant were sent to another village with their consent and thus she

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —५—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

was a consenting party. The prosecutrix has nowhere stated that she was subjected to sexual intercourse without her consent.

On the other hand, learned counsel for the State supported the impugned judgment.

I have heard learned counsel for the parties. I have perused the impugned judgment as also the evidence available on record.

For the purpose of age, the trial court has relied upon the document of Ex.P-6, which has been produced by the father of the prosecutrix during investigation. The Head-master or any teacher of the school from where the mark sheet has been issued has not been examined and this document has been exhibited by PW-3 Nandlal, father of the prosecutrix, who has stated in Para-4 of his deposition that he has produced the mark sheet given by the school, which is Ex.P-6, and the same was seized from him vide seizure memo of Ex.P-5. He does not remember the date of birth of his daughter, however, she was born in the month of Kartik. In the cross-examination this witness has stated that at the time of admission of the prosecutrix her date of birth was written on the basis of entry in the kotwari register and before her admission he had obtained the kotwari register from the Kotwar and produced the same before the school authorities. However, primary evidence i.e. kotwari register has not been produced and proved during trial.

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —5—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

Therefore, taking into consideration the discrepancy in the month regarding birth of prosecutrix in the statement of Nandlal (PW-3) and the date entered in the mark sheet, the date of birth of the prosecutrix mentioned in the mark sheet as 2.4.1988 cannot be held to be proved. However, considering the report of the Radiologist in which the age of the prosecutrix has been assessed as 14 years, it can safely be inferred that in any case the prosecutrix was below 18 years of age on the date of offence.

After going through the statement of the prosecutrix and her father, the arguments of learned counsel for the appellant that the prosecutrix accompanied the appellant of her own free will appears to be probable, as from the evidence of the prosecutrix it is clear that she has nowhere stated that the appellant intimidated her or used any force to take her with him or he committed sexual intercourse with the prosecutrix against her will and the finding of the trial court in this regard in Para-30 of the impugned judgment that from her evidence it does not appear that she was a consenting party is contrary to the material available on record.

However, taking into consideration that the prosecutrix was less than 18 years of age on the date of incident and also considering that there is evidence available on record that the appellant took the

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आदेश पत्रक (पूर्वानुबद्ध)

आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश

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prosecutrix and lived with her as her husband, the trial court has rightly convicted the appellant under Sections 363 & 366 of the IPC.

At this stage, learned counsel for appellant submits that appellant is in jail since 4.7.2003 and as such he has already completed 4 years & more than 4 months of jail sentence and therefore, the sentence imposed upon him under Sections 363 & 366 of the IPC may be suitably reduced and he may be sentenced for the period already undergone by him.

Taking into consideration the overall evidence available on record and also considering the conduct of the prosecutrix that she accompanied the appellant for almost one month of her own will, I am of the considered opinion that ends of justice will be served if while maintaining the conviction of appellant under Sections 363 & 366 of the IPC, the sentence imposed upon the appellant under those sections is reduced.

In the result, the appeal is partly allowed. Conviction of the appellant under Section 376 of IPC and sentence imposed upon him under that section is hereby set aside and he is acquitted of that charge. However, while maintaining the conviction of appellant under Sections 363 & 366 of the IPC, the sentence imposed upon the appellant under those sections are hereby modified and he is sentenced to the period already undergone by him. However, fine sentence imposed upon the appellant under the aforesaid sections by the trial court shall remain as it is. If

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आदेश का दिनांक तथा आदेश क्रमांक	हस्ताक्षर सहित आदेश —7—	कार्यालयीन मामलों में डिप्टी रजिस्ट्रार के अंतिम आदेश
	the appellant has already deposited the fine amount, then he be set at liberty forthwith, if not required in any other case. Sd/- DHIRENDRA MISHRA Judge	